

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

1st FINANCIAL SD, LLC, a Nevada
Limited Liability Company; SEED
CONSULTING, LLC, a Nevada Limited
Liability Company,

Plaintiffs,

v.

BRAD LEWIS, et al.,

Defendants.

Case No. 2:11-cv-00481-MMD-VCF

ORDER

(Defs.' Motion in Limine – dkt. no. 64;
Defs.' Motion in Limine – dkt. no. 65)

I. SUMMARY

Before the Court are Defendants Brad Lewis, Absolute Indemnity Corporation, and Catalyst Credit's Motions in Limine (dkt. nos. 64 and 65).

II. BACKGROUND

This trial concerns a dispute arising out of the soured business relationships between Brad Lewis, Eric Gant, and Kevin Tussy. The Court memorialized the details surrounding this case in its March 20, 2012, Order. (Dkt. no. 52.)

Relevant to this Motion, Plaintiffs 1st Financial SD, LLC and Seed Consulting, LLC filed suit against Defendants on March 31, 2011, alleging (1) copyright infringement, (2) misappropriation of funds, (3) unjust enrichment, (4) civil racketeering, (5) intentional interference with a business, (6) fraud, (7) intentional interference with a contract, (8)

1 intentional interference with a business relationship, (9) breach of a fiduciary duty, and
2 (10) misappropriation of trade secret. The Court dismissed 1st Financial's intentional
3 interference with a business claim. (Dkt. no. 52 at 7.) The remaining claims are
4 scheduled to proceed to trial on October 30, 2012. (See dkt. no. 69.)

5 **III. LEGAL STANDARD**

6 A motion in limine is a request for the court's guidance concerning an evidentiary
7 question. See *Wilson v. Williams*, 182 F.3d 562, 570 (7th Cir. 1999). Judges have
8 broad discretion when ruling on motions in limine. See *Jenkins v. Chrysler Motors Corp.*,
9 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be used to
10 resolve factual disputes or weigh evidence. See *C & E Servs., Inc., v. Ashland, Inc.*, 539
11 F. Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine, "the
12 evidence must be inadmissible on all potential grounds." See, e.g., *Ind. Ins. Co. v. Gen.
13 Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). "Unless evidence meets this high
14 standard, evidentiary rulings should be deferred until trial so that questions of
15 foundation, relevancy and potential prejudice may be resolved in proper context."
16 *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). This
17 is because although rulings on motions in limine may save "time, costs, effort and
18 preparation, a court is almost always better situated during the actual trial to assess the
19 value and utility of evidence." *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1219 (D.
20 Kan. 2007).

21 In limine rulings are provisional. Such "rulings are not binding on the trial judge
22 [who] may always change his mind during the course of a trial." *Ohler v. United States*,
23 529 U.S. 753, 758 n. 3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine rulings
24 are always subject to change, especially if the evidence unfolds in an unanticipated
25 manner). "Denial of a motion in limine does not necessarily mean that all evidence
26 contemplated by the motion will be admitted to trial. Denial merely means that without
27 the context of trial, the court is unable to determine whether the evidence in question
28 should be excluded." *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

1 **IV. DISCUSSION**

2 **A. Defendants' Motion in Limine Regarding Metadata (dkt. no. 64)**

3 Defendants seek to exclude evidence regarding certain metadata located in
4 allegedly infringing Microsoft Word documents that Plaintiffs plan to use to show that
5 Lewis authored the documents. Defendants argue that the metadata's introduction is
6 more prejudicial than probative, and that evidence of authorship through metadata is
7 inadmissible hearsay not subject to any hearsay exception. For the reasons
8 discussed below, Defendants' arguments fail.

9 First, Defendants have not demonstrated that the probative value of this evidence
10 is substantially outweighed by a danger of undue prejudice. Evidence is relevant if: "(a)"
11 it has any tendency to make a fact more or less probable than it would be without the
12 evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid.
13 401. Relevant evidence is generally admissible, though it may be excluded if its
14 probative value is substantially outweighed by a danger of unfair prejudice. See Fed. R.
15 Evid. 402, 403. The metadata here is relevant, and has at least some probative value.
16 It is relevant to determining who authored the documents at issue (though the parties
17 might rightfully contest *how* relevant it might be), since the presence of metadata
18 identifying an author increases the likelihood that the identified author did in fact create
19 the document. Such evidence is also relevant to the credibility of Lewis and another key
20 witness, Mr. Gary Belford, and relevant to the identification of an agency relationship
21 between Lewis and Catalyst Credit.

22 Defendants point to language in this Court's Order describing how such metadata
23 does not establish authorship for the purposes of summary judgment. While it is
24 certainly true that the metadata at issue in this case does not conclusively establish
25 authorship, Defendants should be mindful that such language came in the context of a
26 summary judgment motion with a standard of review far different than that which governs
27 admissibility. Relevant evidence is admissible, regardless of the weight of the evidence,
28 provided that its probative value is not substantially outweighed by undue prejudice.

1 See *S.E.C. v. Jasper*, 978 F.3d 1116, 1124 (9th Cir. 2012) (“That an exhibit contains
2 ambiguities generally goes to the weight and not the admissibility of the evidence . . .”).
3 Defendants do not demonstrate any prejudice that might flow from the evidence’s
4 introduction, nor could they.

5 Defendants also argue that metadata evidence should be excluded as
6 inadmissible hearsay. They specifically note that the metadata generated in the Belford
7 documents was “machine generated.” This fact alone destroys their hearsay claim,
8 since hearsay is defined as a statement made by a declarant. The Federal Rules of
9 Evidence define a declarant as “the person who made the statement,” and a statement
10 as “a person’s oral assertion, written assertion, or nonverbal conduct . . .” Fed. R. Evid.
11 801(a)-(b) (emphases added). Metadata is generated automatically by the software that
12 creates a file, not an individual user. For that reason, it cannot be excluded as hearsay.
13 See *CA, Inc. v. Simple.com, Inc.*, 780 F. Supp. 2d 196, 224 (E.D.N.Y. 2009) (citing 5-900
14 Weinstein’s Federal Evidence § 900.07[1][a]) (“[A]bsent proof of alteration, computer
15 generated data, such as a time stamp attached to a file when it is saved, is generally
16 admissible and taken as true.”); *cf. United States v. Khorozhian*, 333 F.3d 498, 505 (3d
17 Cir. 2003) (citing 4 Mueller & Kirkpatrick, *Federal Evidence* § 380, at 65 (2d ed.1994))
18 (holding that a fax machine’s automatically generated header was not hearsay because
19 “nothing ‘said’ by a machine . . . is hearsay.”).

20 Of course, Defendants may challenge the authenticity of the metadata by
21 providing some evidence of alteration, e.g., arguing that the metadata was deliberately
22 altered by an individual, thereby properly characterizing it as hearsay. See 5-900
23 Weinstein’s Federal Evidence § 900.07[1][a] (“The authenticity of computer-generated
24 data may be challenged if it has been altered However, some evidence is required
25 to justify excluding metadata.”). Defendants make this argument in their Response to
26 Plaintiffs’ Motion in Limine. (See dkt. no. 70 at 6-7.) To the extent that evidence of
27 metadata alteration is introduced, Defendants may seek a limiting instruction that
28 instructs a jury to disregard the evidence if they believe that the metadata was altered.

1 Accordingly, Defendants' Motion in Limine regarding metadata (dkt. no. 64.) is
2 denied.

3 **B. Defendants' Motion in Limine Regarding Damages (dkt. no. 65)**

4 Defendants seek a court order "precluding Plaintiffs from seeking statutory
5 damage or an award of attorney's fees in this matter." Defendants do not tie their Motion
6 to any specific evidence, instead asking the Court to exclude any evidence to support a
7 statutory damage award or attorney's fees on the grounds that the timing of the
8 copyright registration precludes such an award under 17 U.S.C. § 412.

9 Plaintiffs concede that statutory damages and attorney's fees are unavailable on
10 the copyright infringement claims, but seek these remedies through their other claims.
11 Namely, both of these awards are available through a Nevada civil racketeering claim,
12 NRS § 207.470(1), and attorney's fees are available in a trade secrets misappropriation
13 claim in certain cases, NRS § 600A.060. Consequently, Plaintiffs are prohibited from
14 seeking statutory damages and attorney's fees on their copyright infringement claim, but
15 may do so on their civil racketeering claim or their trade secret misappropriation claims.

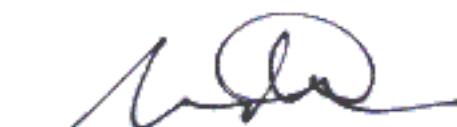
16 Accordingly, Defendants' Motion in Limine regarding damages (dkt. no. 65) is
17 granted in part and denied in part.

18 **III. CONCLUSION**

19 Accordingly, IT IS ORDERED that Defendants' Motion in Limine regarding
20 metadata (dkt. no. 64) is DENIED.

21 IT IS FURTHER ORDERED that Defendants' Motion in Limine regarding
22 damages (dkt. no. 65) is GRANTED in part and DENIED in part.

23 DATED THIS 5th day of October 2012.

24
25
26 
27 MIRANDA M. DU
28 UNITED STATES DISTRICT JUDGE